LO NYUK FAH v. PUBLIC PROSECUTOR

[A.Cr.J. (Silke J.) May 11, 1966]

[Jesselton — Criminal Appeal No. 18 of 1966]

Criminal Law and Procedure — Trial — Sentence — Previous conviction — Mode of proof — Disqualification — Road Traffic Ordinance (Sabah, Cap. 128), s. 14.

The appellant had been convicted on a charge of driving a motor car without due care and attention. In the course of his findings the trial magistrate stated that this was the second offence. He proceeded to invoke the provisions of section 14(3) of the Road Traffic Ordinance and made an order for disqualification from driving for six months. There was no other mention of the previous conviction on the record and the appellant was not given an opportunity to show cause why he should not be disqualified.

Held: (1) where there is a relevant previous conviction the prosecution should produce proof of it and it should be put to the accused for him to admit or deny it; if he does not admit it evidence must be given of the previous conviction; and it is only if the accused admits the previous conviction or it is proved that the court can act on it;

(2) the accused should have been given an opportunity to bring to the notice of the court any special reasons or special circumstances he may have as to why disqualification should not be imposed;

(3) in the circumstances the sentence for disqualification must be set aside.

CRIMINAL APPEAL.

Chong Thain Vun for the appellant.

John Cheng (Deputy Public Prosecutor) for the respondent.

Silke J.: This appeal was heard on the 13th April 1966 and I made an order thereon and stated I would reduce my reasons to writing which I now do.

The appellant was convicted in the magistrate's court at Tawau on the 2nd March 1966 upon a charge under section 14(1) of the Road Traffic Ordinance which read "That you on or about the 31st day of January 1966 at about 1310 hours, along Mile 1½ Kuhura Road, Tawau, did drive a private car T. 2602 on a public road without due care and attention." He was sentenced to a fine of $50 and was disqualified from driving for a period of 6 months.

The appeal is against both conviction and sentence.

The first ground of appeal is that the trial magistrate was wrong in law in holding that there was sufficient evidence before the court to convict the petitioner.

This is entirely a matter of fact for the trial magistrate and it is incumbent upon the appellant to show me that the conviction was either wrong in law, unreasonable or could not be supported having regard to the evidence or would result in a miscarriage of justice.

The facts, shortly, are that the appellant was driving in a line of traffic in the direction of Tawau. That the line of traffic was brought to a halt, that the two cars immediately in front of the appellant stopped one four feet behind the other and that appellant ran into the rear of the car T. 1042 driven by P.W.1 which was directly in front of him.

The appellant in his defence said "I was so taken aback (when car in front stopped suddenly) that my reaction might have been slow".

There is ample evidence to support the trial magistrate's finding and on the face of the record it is in no way wrong in law or unreasonable. The appellant should have been keeping a proper look out. This ground fails.

The second ground of appeal was that the trial magistrate was wrong in law in that he made an erroneous finding of fact.

The trial magistrate in the course of his judgment said "He (meaning the appellant) however struck the car of P.W.1 with sufficient force to drive it into the car immediately in front and driven by P.W.2".

There was no direct evidence of this. On the record P.W.1 is noted as saying "I was about 4 feet from the car in front of me when I stopped", and "as soon as I stopped I was struck from behind by the car driven by the accused".

P.W.2 is recorded as saying "I slowed down and stopped and I heard a bump and on investigation I found that my car had been hit in the rear by the one immediately behind me driven by P.W.1." If these witnesses are believed, and it is clear that the trial magistrate did believe them, then the finding recorded is an inference which the trial magistrate was entitled to draw. This court will be very slow to differ from a trial magistrate where facts alone are concerned. It has been urged upon me that this finding which has been called erroneous purported the trial magistrate to exclude from his mind material circumstances such as the line of traffic, the sudden stop and the appellant's natural inability to react so as to immediately stop his car. In circumstances such as these there is a duty upon the driver to see that his car is in such a position as to be able to bring it to a halt quickly and there is a duty upon him to keep a proper look out. I cannot see that the trial magistrate was in any way wrong in law in drawing the inference that he did. It is in no way unreasonable and this ground of appeal fails.

In the event I dismissed the appeal against conviction.

In respect of the appeal against sentence. In the course of his findings the trial magistrate said "This is the 2nd offence under section 14(1) Cap. 128" and proceeded to invoke the provisions

of subsection (3) of section 14 of the Road Traffic Ordinance.

Now this was the only mention of a previous conviction on the record. How it came to the knowledge of the trial magistrate is not at all clear.

When there is a revelant previous conviction the prosecution should produce some proof of it, and should be recorded as so doing, and it should then be put to the accused and if he admits it the court should proceed to sentence.

If he does not admit the previous conviction then the sworn evidence of some person present at the time of the conviction and who can identify the accused should be given. Under subsection (1) of section 7 of the Fingerprints Ordinance (No. 18 of 1956) a certificate in the form prescribed purporting to be signed by one on behalf of the director shall, until the contrary is proved, be evidence of all previous convictions and sentences and other facts stated therein. If such a certificate is produced then the onus of proving it to be incorrect is upon the accused.

Further in cases similar to this the accused should be given the opportunity to bring to the notice of the court any special reasons or special circumstances he may have as to why disqualification should not be imposed. This should be recorded and the evidence of the accused should be on oath.

Here there was no proof of the previous conviction and no opportunity was given to the appellant to put forward any special circumstances. This occasioned a failure of justice.

In the event I varied the sentence to read Fine of $50: subsection (2) of section 14: conviction to be endorsed on licence. The trial magistrate had overlooked the mandatory provisions of subsection (2).

The appellant was directed to produce his licence within one month from the 13th April to the magistrate so that the endorsement could be entered thereon.

Order accordingly.

GHULAM HUSSAIN v. SHAHAROM & ANOR.

[O.C.J. (Abdul Aziz J.) May 11, 1966]
[K.L. — Civil Suit No. 573 of 1964]

Damages — Personal injuries — Complicated fracture of pelvis with rupture of urethra — Likely to remain impotent and sterile — Pain and suffering and loss of amenities.

The plaintiff, a 29 year old storeman employed by the Telecoms Department was involved in a traffic accident. The injuries that were found on him were, *inter alia*, a complicated fracture of the pelvis with a rupture of the urethra and partial tear of the rectum and the caecum. The nett results of these injuries were that he was likely to remain impotent and sterile and that even if he was eventually discharged from hospital there was little likelihood that he could even lead a comparatively normal life but the doctor was of the opinion that in view of his sedentary occupation and with proper attention and a further operation he would be able to resume his former job. He would be able to walk with a stiff gait. On the question of liability the court found both parties were equally to blame for the accident. On the quantum of damages, special damages had been agreed at $1,691.84 and it had been conceded that there would be no loss of earnings. On the question of general damages,

Held: on a full measure of damages $45,000 would be a reasonable award for loss of amenities, pain and suffering. Consequently there was judgment for the plaintiff against the defendant for $23,345.92, interest at 6% and costs.

[Editorial Note: See *Ban Pet Hock* v. *Ong Ah Ho*, p. 253, where Choor Singh J. held that on principle interest should not be allowed when damages are awarded in running-down cases, and gave his reasons for so doing.]

Cases referred to:—

(1) *Lim Cheng Siew* v. *State Advocate-General* [1965] M.L.J. xxvii.

(2) *Liow San* v. *Chai Choo Kim* [1962] M.L.J. 429.

(3) *Chua Kim Liang* v. *Teo Kim Ngo* [1963] M.L.J. 262.

(4) *Digest of damages in leg cases in* [1964] M.L.J. xlv.

CIVIL SUIT.

Denis Murphy for the plaintiff.

L. T. Chan (Miss) for the defendants.

Cur. Adv. Vult.

Abdul Aziz J.: This is a claim for special and general damages arising out of a traffic accident which occurred on the 1st October 1963 at Sungei Besi Road, Kuala Lumpur.

The plaintiff's version of the accident was that on the day in question he was riding a motor cycle towards Kuala Lumpur town and travelling at 22 miles per hour when he saw some female cyclists ahead of him riding two abreast also travelling in the same direction. As he neared them he sounded his horn and they went into single file. He then swerved out to overtake the cyclists and as he did so he was knocked down from behind by a military lorry which was travelling in the same direction. On cross-examination he said that he first saw the two cyclists thirty to forty yards ahead of him and at that time he was three feet from the grass verge. Also, when he decided to overtake the cyclists he did not anticipate any vehicles coming from behind and he did not take precautions to ensure that no vehicles were in fact coming from behind.

The first defendant's version was that on the day in question as he was travelling along Sungei Besi Road he saw two motor cycles 10-15 yards ahead of him and two cyclists ahead of the motor cyclists. The two cyclists were riding two abreast about 1-2 feet from the grass verge and behind them were two motor cyclists riding in single file. He then gave a signal by sounding